

TOP TIPS IN MISSTATEMENT AND OVERPAYMENT CASES

The legal test and information gathering

Whilst there are a number of practical steps involved in determining a misstatement case, or recovering an overpayment, this is underpinned by certain legal principles. These principles will inform the information that you must gather when investigating the issues.

- The basic legal position is that members are only entitled to be paid benefits in accordance with the scheme's trust deed and rules and legislation.
- In misstatement cases, consider what the member would have done if he/she had been provided with correct information at the time instead of incorrect information.
- In overpayment cases, consider the extent to which a member has "changed his/her position" as a result of the overpayment.
- Ensure you are certain an error has been made before communicating with the member.
- When there has been an error, try to identify the cause and determine whether the error affects a wider category of members.
- Information gathering is vital. Do so early as experience shows that members are more forthcoming in providing information before a decision is made.
- You should keep your efforts proportionate but, subject to that, try to get as much information as you can from the member, the administrator and potentially the employer and any IFA. This information may include:
 - Copies of past communications that the member has received;
 - Notes of telephone calls between the member and administrator;
 - Financial statements and details of any other pension benefits; and
 - Corroborating statements from third parties.

Decision-making

Ultimately a decision will need to be made by the relevant decision maker as to whether the member has suffered loss in reliance on the incorrect statement or the overpayment.

- The decision maker does not have to be 100% certain about the way the member would have acted, but rather has to be satisfied on the balance of probabilities in reaching a decision.
- Draw up a timeline to demonstrate whether or not the evidence gathered fits the member's chronological explanation.
- In misstatement cases, ask whether the member relied on the incorrect information; what would the member have done had the correct information been provided and has he/she suffered financial loss?
- Whether it is reasonable for a member to rely upon an incorrect quotation will depend upon the extent and accuracy of previous communications.
- The decision maker must consider whether it is reasonable to expect the member to mitigate the loss he/she is claiming by, for example, seeking alternative employment to make up the shortfall in their benefits.
- In overpayment cases, consider both the recovery of the past overpayments and the adjustment of the pension to the correct level in future. Where a pension is to be reduced going forward, adequate notice should be given.
- Where a member has been overpaid, as a rule of thumb, recovery should be sought over no shorter period than that over which the member was overpaid.
- When communicating with members, the tone of the letter should be firm but fair and an apology should always be offered when it is clear that an error has been made.

- Consider carefully a member's change of position defence on a case by case basis. Consider each item individually to decide whether the expenditure constitutes a loss or would have been incurred in any event even if the pension had been correctly paid.

Compensation and repayment

If it is decided that a member has a valid case, in whole or in part, the issue of compensation will need to be considered.

- In misstatement cases, consider the loss that the member has actually suffered as a result of the decisions he/she has taken. The difference between the correct and the incorrect quotation will act as a cap on the compensation the member can receive. Consider the extent to which it is possible, and reasonable, for a member to mitigate their loss by seeking alternative employment.
- Where the misstatement or overpayment arises from the administrator's error, engage with the administrator at an early stage and, if you intend to seek recovery of any compensation from the administrator, do not make an offer without discussing it with them.
- If repayment is being made by way of a deduction from future pension payments, it is important to communicate clearly with the member about the action that is being taken and explain the impact this will have on their pension and for how long.
- Where a mistake has been made by way of a misstatement or an overpayment this may well constitute maladministration and consideration should be given to making an award to a member for any distress and inconvenience suffered.
- Consider the potential tax consequences of your actions. Although they should not drive your actions, they will need to be considered and, if applicable, addressed.

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